

No. 16379. /

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction.

Judgment of conviction was entered on October 8, 1958 [R. 31].¹ Notice of appeal was duly filed on October 17, 1958 [R. 33-34]. The District Court had jurisdiction of this case pursuant to Title 18, Section 401 of the United States Code. The jurisdiction of this Court is invoked under Title 28, Section 1291 of the United States Code.

Statute Involved.

Section 401 of Title 18 of the United States Code provides in pertinent part as follows:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; * * *.

¹"R" refers to the Transcript of Record. "Tr." refers to the Reporter's Transcript of Trial Proceedings.

Statement of the Case.

Appellant's Statement of the Case is uncontroverted, except as to "C. Questions Presented and How Raised," which is controverted.

The question presented is whether there is substantial evidence to sustain the District Court's finding that appellant's contumacious conduct constituted a criminal contempt by obstructing the administration of justice.

ARGUMENT.

A. The Applicable Law.

The Government agrees that perjury alone is not punishable as contempt and that to be so punishable there must be the further element of obstruction to the performance of judicial duty beyond that inherent in the perjurious character of the testimony. *Ex parte Hudgings* (1919), 249 U. S. 378, 63 L. Ed. 656, 39 S. Ct. 337. This view was explicitly reaffirmed in *In re Michael* (1945), 326 U. S. 224. Both the *Hudgings* and *Michael* cases, however, recognize that the fact that perjury is involved does not preclude a prosecution for contempt. As *Hudgings* states (249 U. S. at 282, 283):

* * * Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional circumstances so justify, be the subject matter of a punishment for contempt.

* * * * *

* * * in order to punish perjury in the presence of the court as a contempt there must be added to the

essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this see *United States v. Appel*, 211 Fed. Rep. 495. * * *

In *Ex parte Michael* (326 U. S. at 228) this view is stated as follows:

* * * Of course, the mere fact that the false swearing is an incident to the obstruction charged does not immunize the culprit from contempt proceedings. * * *

The basic teaching of *Hudgings* and *Michael*, therefore, is that an obstruction to the performance of judicial duty resulting from an act done in the presence of the court is the characteristic upon which the power to punish for contempt must rest. This element was not found in *Hudgings* for as the Supreme Court said at page 382:

Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, *it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was willfully refusing to testify truthfully, that is, was committing perjury.* * * * (Emphasis supplied.)

Again at page 384:

Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone, without reference to any circumstance or condition giving to it an obstructive effect. (Emphasis supplied.)

Nor was this element found in *Michael* for as the Supreme Court stated there at pages 228-229:

Here there was, at best, no element except perjury "clearly shown." Nor need we consider cases like *United States v. Appel*, 211 F. 495, 496, pressed upon us by the government. For there the Court thought that the testimony of Appel was "on its mere face, and without inquiry collaterally, . . . not a bona fide effort to answer the questions at all." In the instant case there was collateral inquiry; the testimony of other witnesses was involved to convince the trial judge that petitioner was a perjurer. Only after determining from their testimony that petitioner had willfully sworn falsely, did the Court conclude that petitioner was "blocking the inquiry just as effectively by giving a false answer as refusing to give any at all." * * *

Thus, *United States v. Appel*, 211 Fed. 495, which was given explicit endorsement in *Hudgings*, and which more recently the Supreme Court took pains to distinguish in *Michael*, deals with a situation where the element of obstruction was thought by the Supreme Court to be sufficient to justify punishment of the witness for contempt. In that case, the witness was examined as to what he had done with various substantial sums of money which he had withdrawn from his account shortly before his grand jury testimony. He first answered that he did not remember and later that he lost various amounts at gambling. Judge Learned Hand, in sustaining a charge of contempt, stated the essence of the matter as follows (211 Fed., at 495):

The power of the court to treat as a criminal contempt a persistent perjury which blocks the inquiry is settled by authority in this circuit. * * * It is indeed impossible logically to distinguish between the

case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.

The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before if he was sane or sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and *the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.* (Emphasis supplied.)

The *Appel* test, of whether on its face, and apart from inquiry collaterally, the testimony was not a bona fide effort to answer the question at all, has been applied in a number of other decisions. See, *e. g.*, *In re Meckley*, 137 F. 2d 310 (C. A. 3), certiorari denied, 320 U. S. 760, where the court, in sustaining the contempt conviction had this to say at page 311:

What the court did was to conclude from a reading of the defendant's answers to the questions asked him before the grand jury that, on the whole, he had been evasive, reluctant and dissembling for the intended

purpose of obstructing the grand jury from ascertaining anything from him concerning the matter under inquiry as to which he was obviously in possession of knowledge and that such was indeed the quite evident effect of his conduct. We think it is clear that such conduct amounts to contumacy. (See also opinion in District Court, 50 Fed. Supp. 274, 275-277 (M. D. Pa.).)

The federal cases abound with decisions in which obstructive, evasive and contumacious answers have been held to be contemptuous of judicial authority and which have been held to obstruct the administration of justice. Examples of these are as follows:

(1) When the witness' testimony is considered in connection with the known and undisputed circumstances, it is self-evident that the witness did deliberately try to thwart the purpose of the investigation. (*Schleir v. United States*, 72 F. 2d 414, 417 (C. A. 2).)

(2) When the witness has admitted at many places in evidence that earlier answers given by him were not true. (*United States v. McGovern*, 1 Fed. Supp. 568, 569 (S. D. N. Y.).)

(3) When a witness resorts persistently to subterfuge and evasion, if not to deliberate falsifying, to prevent a disclosure of what knowledge he had and was asked to give. (*United States v. McGovern*, 60 F. 2d 880, 890 (C. A. 2).)

(4) When a witness disclaims any knowledge about what he must in the nature of things have known. (*Loubriel v. United States*, 9 F. 2d 807, 808 (C. A. 2).)

(5) When the answers of a witness are trifling and he resorts to shifts and subterfuge in the place of truth. (*Loubriel v. United States* (*supra*).)

(6) When the answer of a witness tends to block the inquiry by the first preposterous fancy which he chooses to put forward. (*Loubriel v. United States supra*.)

(7) When the witness' testimony is an evasion by obvious subterfuge and mere formal compliance. (*United States v. Appel*, 211 Fed. 495.)

(8) When a witness parries with the examiner, refuses to state his best recollection, or manifests a determination not to give his best recollection of facts about which he is being interrogated. (*O'Connell v. United States*, 40 F. 2d 201, 205 (C. A. 2).)

It is submitted that the evidence in this case, discussed hereinafter, meets virtually all of the above tests. In a criminal contempt proceeding, the district court must be convinced of the witness' guilt beyond a reasonable doubt. (*Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 444; *In re Eskay*, 122 F. 2d 819, 822 (C. A. 3); *Russell v. United States*, 86 F. 2d 389, 394 (C. A. 8); *United States v. Dachis*, 36 F. 2d 601, 603 (C. A. 2).) But where the court makes a finding to that effect, as the District Court did here [Tr. 351-353], the function of an appellate court, as in any criminal case, is merely to determine whether the finding is supported by substantial evidence. (*Toledo Newspaper Co. v. United States*, 247 U. S. 402, 420; *Meckley (supra)*; *Kelton v. United States*, 294 Fed. 491, 494; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 338; *Green v. United States* (1958), 356 U. S. 165, 179.)

B. The Evidence.

The Government's evidence consisted of the entire testimony of appellant before the Grand Jury on April 16, May 23, July 14 and July 25, 1958, which was introduced into evidence through the official court reporters. [Exs. 2, 4, 5, 6, 7.] In addition, the foreman of the Grand Jury, Robert E. Battles, testified in substance as follows:

Appellant appeared as a witness before the Grand Jury in connection with the murder on October 28, 1957 of one Cecil Thomas, who was to have appeared as a Government witness in federal court the next day, October 29, 1957 [Tr. 73-74]. Appellant first appeared as a witness before the Grand Jury on April 16, 1958 [Tr. 77] and he later appeared before it on May 23, July 14 and July 25, 1958 [Tr. 78]. Appellant did not refuse to answer any questions [Tr. 88] but his demeanor was at times "surly" and "smart alecky" though this was not a prevalent attitude throughout his testimony [Tr. 89]. Appellant was not informed by the Grand Jury of the nature of its inquiry [Tr. 77-78], and the inquiry continued after July 25, 1958 [Tr. 78]. When appellant testified before the Grand Jury on April 16, 1958, the Grand Jury did not have any information as to anything that had been told to Mr. Schauer, two Treasury Agents and Mr. Goldschein in the office that morning [Tr. 84-85]. The Grand Jury did not have any information subsequent to that that appellant did not tell the story to Mr. Schauer, Mr. Goldschein and two Treasury Agents [Tr. 87-88].

Appellant offered no testimony at the trial in his defense.

The sole question before the Grand Jury then was the murder of Cecil Thomas, who was shot to death on the

day before he was to have been a witness in federal court. Appellant was called before the Grand Jury for the purpose of determining his knowledge of this murder. The presentment charges that appellant told the Grand Jury several conflicting stories concerning the murder of Cecil Thomas [R. 3-11]. For purposes of clarity these are denominated in Appendix A² as (1) The Burglary Story; (2) The Story about the Loan of \$250; and (3) The Three Men Story. The presentment also charges that appellant told the Grand Jury many other conflicting stories in the course of his testimony. These are also denominated in Appendix A under the following headings: (4) Length of Time Appellant had known Thomas; (5) How Appellant came to know Thomas; (6) Number of Times Appellant was in Thomas' House; (7) Appellant's use of Narcotics; (8) Appellant's knowledge of quantities of Heroin; (9) Appellant's purchases of Heroin; (10) Appellant's description of car.

In order to determine whether there was an obstruction to the administration of justice, the factual question of what appellant said that the Grand Jury complained of as an obstruction must be examined. The Grand Jury set forth in its presentment some of the highlights of appellant's testimony to call the Court's attention to its complaint, but it expressly made the entire transcript of his testimony before it a part of the presentment as evidence of its obstructive tendency [R. 11-12].

Since the giving of evasive and obstructive answers seldom appears from a single answer or from a small portion of a witness's testimony, and only by considering

²The pertinent portions of appellant's testimony before the Grand Jury are set out in Appendix A which is referred to hereinafter as "App. A."

a large number of questions and answers will such obduracy become apparent, let us consider certain portions of appellant's testimony which highlight the grossness of his contempt.

In his first appearance before the Grand Jury on April 16, 1958, appellant testified that he was confined in the penitentiary and that he entered a plea of guilty to the murder of Cecil Thomas (App. A-1). He further testified that on October 28, 1957, after determining that no one was at home, he entered the home of Cecil Thomas by taking a rear screen off, and while he was in the process of burglarizing Thomas' home, Thomas came in through the front door; that while he, appellant, was in the kitchen at the rear of the house, Thomas, after entering the house, went into his room or the rest room. Appellant heard Thomas "cut a light on" and then Thomas came toward the kitchen and at that time appellant stepped out and told Thomas not to move, and Thomas asked what was this and jumped toward appellant and appellant shot Thomas, who fell forward (App. A, 1-2).

However, on the same day, April 16, 1958, appellant testified to a contradictory story, that is, that he told Mr. Schauer, two Treasury Agents, and Mr. Goldschein in their office that morning that Thomas had called him and told him to come over to his house as soon as he could if he wanted to make some money; that he went to Thomas' house and upon his arrival Thomas asked him if he would like to make "a half a piece of stuff." Then appellant asked him what he would have to do, and Thomas told him to stay there with him that night. Appellant further testified that at this point Thomas asked him if he heard someone walking toward the back of the house and asked him to take a look, which he did. Appellant said that as he stepped out the back doorway someone twisted

his neck, frisked him and took his gun. Another man took him from the rear of Thomas' house to a car parked out front and after that he heard two shots and one of the men came running from the house and got in the car and they drove off (App. A, 7-8).

On the same day, April 16, 1958, appellant further continued his testimony and gave a third version of the murder of Thomas. When asked why he went to Thomas' house, appellant said that he had given Thomas some money earlier that week and that Thomas had been putting him off; that he just went over to Thomas' house and told him that he had to have some money "or stuff." Thomas went into his bedroom and came back with a 30-30 rifle and told him to leave the house (App. A-4). However, appellant abandoned this story when asked:

"Q. Don't you know that when Cecil Thomas was found dead on the floor that he had a clothes brush in one hand and some trousers and a hanger—
A. Yes,

Q. —on top of him? A. Yes. That's what the officers told me" * * * (App. A, 5).

On the same day, shortly after the foregoing testimony, appellant was asked "Which story is true now?" and appellant answered, "The one I told you in the office this morning," and went on to testify to this version of the murder of Cecil Thomas, to wit: That Thomas called him and asked him if he would like to make some money. He said he would and that he would get to Thomas' house as soon as he could. He got there about 8:30 or 9:00 o'clock. He and Thomas were in the living room when Thomas asked him if he heard somebody walking outside and asked him to take a look. Appellant testified that as he looked out through the back doorway, someone pushed

his head to one side and put a revolver "in the back of my neck" and told him, "Don't move, buddy boy." At that time they frisked him and got his .38 caliber revolver and one of them took him to the car. He was not sure, but he thought another man went into the house. About two minutes later, he heard two shots and one of the men came running back and got in the car and they drove off. The two men in the back seat were white and the one in the front seat he could not see because his cap had been pulled down over his eyes as he got into the car. He sat on the back seat with a heavy set man on his right and another man on his left. They dropped him off somewhere on the other side of Washington Street, gave him a thousand dollars, and told him to keep his mouth shut or something would happen to his kids. The heavy set one on his right gave him the gun, opened the door and appellant got out (App. A, 8-12).

When appellant appeared before the Grand Jury on July 14, 1958, he was asked why, when he was first brought to Mr. Goldschein's office, he had told Messrs. Schauer, Warner, Smith and Goldschein that Thomas called him on the phone, telling him to come to his house with his pistol—The Three Men Story—and when he first went into the Grand Jury room he told the burglary story. Appellant answered that as far as he was concerned this was the true story—that is what he was tried and convicted of. When asked whether he meant that the burglary story was the true story, he answered, "Well, what do you want me to mean?" He then testified that the story about the three men in the car was the true story (App. A, 13-14).

In addition to these three antithetical versions told by appellant of the murder of Cecil Thomas, which could have no other design or effect than to block the inquiry of the

Grand Jury, appellant told the Grand Jury many other conflicting stories of facts ancillary to the main inquiry which demonstrate his contumacious conduct. For example, on April 16, 1958, appellant testified that he had known Thomas for three or four months. Later the same day he said he had known him for about four or five months. On May 23, 1958, he testified that he had known Thomas three or four years at the most before the day of the murder. Finally, on July 25, 1958, he testified that he did not remember how long before the day of the murder he had met Thomas, but later that day he said that he had known him for about four years (App. A-17).

Again, on April 16, 1958, appellant testified that he was in Thomas' house once—"That's when I shot him." However, on July 25, 1958, he testified that he had been in Thomas' house once before (App. A, 18-19).

Concerning his use of narcotics, appellant testified on April 16, 1958, that he used heroin and had a habit of about "two spoons" a day that cost him about forty or fifty dollars a day; that he spent the thousand dollars that he got from the three men in the car to buy narcotics and a few clothes. However, on July 14, 1958, he testified that "a spoon" would last him a month. On July 25, 1958, he testified that he never stated before the Grand Jury that he was addicted to heroin or that he had a habit of twenty or forty dollars a day, but said that he testified that he would get "a spoon" of heroin that would cost him twenty-five dollars that would last him some time (App. A, 19-20).

Concerning his knowledge of quantities of heroin, appellant testified on April 16, 1958, that half a piece of stuff (heroin) is half an ounce more or less, and the number of spoons in an ounce depended on how much the

heroin had been cut. However, on July 14, 1958, he testified that he did not know how much a half a piece was; that he was not that familiar with narcotics. On the same day he also testified that he bought six or seven spoons of heroin at a time from Walter Alexander (App. A, 20-21).

Concerning his purchases of heroin, appellant testified on April 16, 1958, that he had never bought any narcotics from "Big J." On May 23, 1958, he testified that he also purchased heroin from "Big J.", Walter Alexander, Shirley, Marie and Don Newton (App. A, 22-23).

With respect to the car involved in the "Three Men Story," appellant first testified that it was a 1956 or 1957 grey Ford. But on July 25, 1958, all he would say about the car was that it was a four-door medium sized car (App. A, 24).

Appellant's testimony concerning other details of the "Three Men Story" was so contradictory as to expose it on its face as a preposterous fancy. For example, he gave varied versions about the money received from the three men in the car. On April 16, 1958, he testified that one of the three men gave him one thousand dollars (App. A, 9). However, on May 23, 1958, he said that one of the men gave him five hundred dollars (App. A, 12). But on July 14, 1958, he testified that he could not remember whether the amount was five hundred or one thousand dollars; that he never had as much as five hundred or one thousand dollars in his possession before at one time (App. A, 14-15).

C. Conclusion From the Evidence.

The transcript of appellant's testimony before the Grand Jury plainly supports the District Court's finding that appellant was guilty of contempt by obstructing the Grand Jury's investigation. Almost all of appellant's testimony before the Grand Jury was conflicting, incapable of belief, evasive, misleading, or false and amounted to a concealment of material facts. The whole transcript of his testimony from beginning to end shows by his attitude, his conduct and his contradictory statements that it was intended to block the Grand Jury in its inquiry.

The District Court, in finding that appellant's guilt was shown beyond a reasonable doubt [Tr. 351-353], had this to say:

Of course, the question here, as I view it, is not whether the stories he told are shown beyond a reasonable doubt to be untrue; but whether the evidence shows beyond a reasonable doubt that the defendant as a witness before the grand jury was not making a good faith attempt to answer the questions propounded to him. And if so, of course, whether such conduct obstructed the functioning of the grand jury and, so, the administration of justice.

There is no doubt at all in my mind that the defendant did not make any good faith attempt to answer these questions. He was playing "cat and mouse" so to speak, with the questioner. On the face of it there was no bona fide effort to perform as a witness. He feigned certain answers and he pretended others. And on the whole I would say without any question of a doubt he trifled with the grand jury.

* * * * *

As I view it the obstruction here is greater than if the witness had just said, "I refuse to tell you

anything about it”—not claiming the privilege. * * * So he was under a full obligation to tell the truth, the whole truth and nothing but the truth in making responses to the questions.

He certainly would have saved the time of the grand jury and would have obstructed justice much less if he would have said, “I won’t answer any of that. I won’t tell you anything.” Then the grand jury would have at least known where they stood.
* * *

It is thus clear that, entirely apart from any perjury on his part, appellant was charged and was found guilty of giving obstructive and evasive answers to the Grand Jury which did in fact obstruct the administration of justice. In this light the findings of the District Court are abundantly sustained by the testimony.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be affirmed.

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APPENDIX A.

THE BURGLARY STORY

April 16, 1958

Page 195: Q. Now, you are now confined in the penitentiary after you entered a plea of guilty to the murder of Cecil Thomas?

A. That is correct.

Page 201: Q. How many times were you in his home?

A. Once.

Q. When was that once?

A. That's when I shot him.

Q. What?

A. That's when I shot him.

Q. All right. What did you go there for?

A. At that time?

Q. Yes.

A. To commit a burglary.

Q. Now, what time did you get there?

A. 8:30 or quarter to 9:00 or maybe later.

Q. All right. Then, go on and tell the Grand Jury the story.

A. Well, there was no one there. I knocked on the door pretty loud. If there had been anyone there, he would have come to the door. So at that point I went by on the side of the house, took the back screen off and went in, and I was going, you know,

Page 202:

looking around to see what I was going to take, and at that point I heard someone coming in the front door, so at that time I took a hiding place in the kitchen of his home, and at that point I was watching him as he came in, and he came in and he went to his room, or either the rest room. I remember hearing him cut a light on, and when he came back, he was coming back towards the kitchen, and at that time I stepped out, and I told him not to move, and he asked me "what was this," and at that point I was backing up, and he jumped at me, and when he jumped at me, I shot him, and I left the house running.

ADDITIONAL ON THE BURGLARY STORY

July 14, 1958

Page 1686:

Page 1687:

Q. Now, the first time you came before the Grand Jury, Bobby, you told a story about killing Hardrock in the course of a burglary; do you remember that?

A. Yes I do.

Q. Why did you tell the Grand Jury that you killed Cecil Thomas in the course of a burglary?

A. Why did I tell the Grand Jury that? Well, that is what I have been found guilty of and tried for.

Q. You were sworn when you appeared before the Grand Jury to tell the truth, weren't you?

A. Yes, I was.

- Page 1687: Q. Before you were brought before the Grand Jury the first time, you were in my office with Mr. Schauer and Mr. Warner and Mr. Smith, and at that time you told us about Cecil Thomas calling you on the telephone and telling you to come to his house, and you brought your pistol along, and the story about the three men. Now, when you got into the Grand Jury room here, you went back to the story of the burglary. Why did you do that?
- A. Well, as far as I am concerned, that is the true story. That is what I was tried and convicted of.
- Q. As far as you were concerned what?
- A. That is the true story; that is what I was tried and convicted of, murder and burglary.
- Q. You mean that is what really happened?
- Page 1688: A. No, that is not what I said. I have told you what really happened.
- Page 1689: Q. Now, which of these stories that you told the Grand Jury are the true stories, Bobby?
- Page 1690: A. The one you just got through reading to them.
- Q. The one about the three men in the car?
- A. That's right.

THE STORY ABOUT THE LOAN OF \$250

April 16, 1958

Page 206:

Q. Didn't you tell the Treasury Agents that Big Jay pointed out the house to you and told you there was a lot of loot there?

A. Yes, I also told him it was a burglary.

Q. What is that?

A. I also told him it was a burglary, that I went there to burglarize his home.

Q. That was not the truth?

A. No.

Q. Now you say you told the Treasury Agents that you went there to burglarize Cecil Thomas' house but that wasn't true?

A. That's correct.

Q. What did you go there for?

A. I had gave Cecil Thomas some money earlier that week and he had been putting me off about it so I just went over there that night and I told him, I said, well, you got to have some money or some stuff and he said at that time that my money was tied up and that he didn't have any stuff and then I repeated again, I said well you have got to have some money or some stuff and he said wait just a minute, I have got some and at that time he went back in his bedroom and when he came back he had a 30-30 rifle and at that point he

was telling me to leave the house and he didn't know when he was going to give me any stuff or when he would have any money for me.

Page 207:

Q. Don't you know that when Cecil Thomas was found dead on the floor that he had a clothes brush in one hand and some trousers and a hanger—

A. Yes.

Q. —on top of him?

A. Yes. That's what the officers told me.

Q. Well, how was he holding a rifle with a brush in one hand and the trousers and hanger on him if he had been carrying it?

A. I really don't know. From the understanding I got someone else was there after.

Page 207:

Q. Look at this photograph number 049833.

A. Yes.

Q. Is that the way he was lying when you left him?

A. Well, not on his back, no.

Q. What?

A. Not on his back, no.

Q. You mean he didn't have that brush in his hand?

A. No he didn't.

Page 208:

Q. You notice a pair of dark pants laying on top of him as he was lying there?

A. Yes.

- Q. He didn't have those?
- A. He didn't have no pants at all because he fell forward.
- Page 210: Q. Why didn't you tell the police what you just told the Grand Jury?
- A. Well, I was afraid to bring narcotics into it.
- Q. You thought narcotics was more serious than murder?
- A. Than burglary?
- Q. Than burglary?
- A. Yes.
- Page 212: Q. Now, tell the Grand Jury, did you think handling narcotics would be more severe on you than if you committed murder?
- A. No I didn't think it would be more severe.
- Page 215: Q. Are you sure that it was Hardrock you gave that \$250.00 to?
- A. Yes.
- Q. Then all you did that evening was to go down to the house to get from him the \$250.00?
- A. Yes.
- Q. Then this story about taking the screen off the side of the window to get in wasn't true, was it?
- A. Yes, it wasn't true.
- Page 217: Q. All right. Will you tell the Grand Jury now why you told the Police Dept. that it was in the course of a burglary that you killed Cecil Thomas rather than a fight over narcotics?

- A. Well, in the County Jail I had talked to one or two of the fellows and they more or less advised me not to mention narcotics. They said it would be more severe than burglary.

THE THREE MEN STORY

April 16, 1958

Page 203:

Q. And what did you tell us he called you about?

A. Well, he more or less wanted protection.

Page 204:

Q. What did he say to you on the telephone, what did you tell us?

A. Well, he said if I—he ask me would I like to make some money, and I told him yes, and he said well, could you come over to my house right away, and I said yes, I would, as soon as the bus could get me there, and when I got there, he asked would I like to make a half a piece of stuff, and I told him yes.

* * * * *

A. And at that time I asked him what would I have to do, and he said well, all you have to do is stay here with me tonight, and I told him all right, and at that point he asked me did I hear that, and I said hear what, and he said it sounded like someone was walking, and I said walking where, and he said more or less to the back, and he asked me to take a look, and at that time I did.

Q. Then what happened?

A. At that time I don't know exactly who it was, but someone twisted my neck and one said, "Frisk him" and they did and they found a gun. The other one took me to the car and after that I heard two shots, and then one came running from the house and got in the car and drove off.

Page 229:

Q. Which story is true now?

A. The one that I told you in the office this morning.

Q. All right now take your time and go on and start from the beginning?

A. * * * Well, like I say, Hardrock called me and told me that he asked me would I like to make some money. I told him yes. Then he told me how soon would I be able to make it to his house and I told him as soon as the bus would get me there. I think I got there, about oh 8:30 or 9:00 o'clock, I disremember. Anyway we was standing in the living room talking and he asked me did I hear that. And I told him no, I didn't hear nothing. He said that it sounds like somebody that is walking outside. And he asked me to take a look, and at that time I did.

Page 230:

A. And as I stepped out the back door someone pushed my head to one side and put a revolver in the back of my neck and told me "Don't move, buddy boy." And at that time they frisk

me and got the 38 revolver, one of them took me to the car, and I'm not sure but I think the other one went in the house. Anyway, about two minutes later I heard two shots and then one came running back and they got in the car and drove off. They dropped me off on the other side of Washington, somewhere, I don't remember exactly where it was, and *they gave me a thousand dollars* and told me to keep my mouth shut or something would happen to my kids. A—and at that time the heavy one on the right told me—told the other one, "Say, he know how to play his cards," or something like that and he gave me the gun and opened the door and I got out.

Page 231:

* * * * *

- Q. What did the heavy set one look like?
A. Well he was—I didn't get a chance to see exactly what he looked like. The only thing I saw was his hands.

Page 232:

- Q. Was he white or colored?
A. He was white.
Q. Was the other man with him white?
A. The two in the back were, the one in front I didn't see.

* * * * *

- Q. How come you didn't see him.
A. Well, they had—I was wearing a cap and they had the bill pulled down to here.

Page 240:

Q. Now couldn't you tell as you were getting in the car whether the driver was a white man or colored man?

A. The driver, no, the driver wasn't sitting in the car.

Q. He was not sitting in the car?

A. No. Just the one in the back.

Q. All right. Was that the heavy one or the slim one?

A. That was both of them. The heavy and the slim.

A. —and a few minutes later I heard the shots and this other one came running out.

Q. The what?

A. This third party he came running out.

Q. Where did he get?

A. He got in the front seat.

Page 244:

Q. Which one gave you the thousand dollars?

A. The one on the right.

* * * * *

Page 245:

Q. Where did he get the thousand dollars?

A. From his pocket.

* * * * *

Q. Out of the side coat pocket?

A. Yes.

Q. Jacket pocket?

A. No it wasn't a jacket it was a suit. (Collins could see that it wasn't a jacket.)

Q. A what?

A. A suit.

Q. The jacket from the suit. We call this a jacket.

A. Oh, you do. I usually call them a dress coat.

Q. He took it out of his dress coat?

A. Yes.

Q. Was it rolled up or flat?

A. It was rolled up.

* * * * *

Q. And he handed you the money?

A. Yes.

Page 246:

Q. With his left hand?

A. Yes.

Q. Told you it was a thousand dollars.

A. Yes.

* * * * *

Q. What did he say he was giving you the thousand dollars for?

A. To keep my mouth shut.

Q. Now will you tell the Grand Jury just what happened from the time you got in the car, what happened and what was said by each and all of them, will you do that? It will be very helpful if you can remember it.

A. I know we drove around the block and come out on Washington, (They drove down three or four blocks and they make a left off of Washington,) and no one said anything until we got on a side street, and at that time, I think it was the one in the front, he made a statement, asked me if I didn't have two kids and I told him

Page 247:

yes, (and he asked me did I love my kids, you know, and I told him yes) and he said well, that was nice to know. By that time the car had stopped and this heavy one told me here is a thousand dollars, to keep your mouth shut and if you—If you talk or say anything something would happen to your family, and the other one said well, he knows how to play his cards. That was the conversation. He threw the gun at my stomach and opened the door and let me out.

May 23, 1958

Page 1239:

A. He walked back as far as the bar, and at that time I stepped out the back door and somebody pushed my head and put a cold piece of something here. I guess it was a revolver; and told me not to move and they frisked me and took the gun that I had off me, and the other one took me to the car; and as I got in the car he pulled the hat down to here. About two or three minutes later I heard a shot and I heard someone running from the back end of the house, and got in the car and drove off.

It was somewhere on the other side of Washington; I don't know exactly what the name of the street was, that I was given \$500 and told to keep my mouth shut and get

out of town. And the other one said; "Well, Bobby knows how to play his cards, and he has got two beautiful kids. Isn't that right, Bobby?" and I said "That sure is right," and at that time I was handed a gun and the door slammed and the car drove off.

Page 1244:

Q. Now, about the men in the car, who were the men in the car Bobby?

A. I don't know them, Mr. Goldschein.

Q. Describe them.

A. I couldn't even describe them to you, because I didn't see them.

Q. Well, you saw them before they pulled the hat over your eyes; they didn't do that until they got in the front of the car, I believe you told us.

A. No, I told you that when I came out of the house that one of them turned my head to the side and the other one frisked me and that one marched me to the car and the other one went in the house; and as I got in the car, my hat was pulled down over my eyes so that I couldn't see.

Page 1245:

July 14, 1958

Page 1687:

Q. Before you were brought before the Grand Jury the first time, you were in my office with Mr. Schauer, Mr. Warner and Mr. Smith, and at that time you told us about Cecil Thomas calling you on the telephone and telling you to come to his house, and you

brought your pistol along, and the story about the three men. Now, when you got into the Grand Jury room here, you went back to the original story of the burglary. Why did you do that?

A. Well, as far as I am concerned that is the true story. That is what I was tried and convicted of.

* * * * *

Page 1688: Q. * * * What do you mean by that was a true story—you mean the one about the burglary was the true story?

A. Well, what do you want me to mean?

Page 1689: Q. * * * Now, which of these stories that you told the Grand Jury are the true stories, Bobby?

Page 1690: A. The one you just got through reading to them.

Q. The one about the three men in the car?

A. That's right.

* * * * *

Q. Now you told the Grand Jury that they gave you \$1,000.

A. Yes.

Q. Do you remember that?

A. I remember making that statement.

Q. Was that true?

A. It was either \$1,000 or \$500, I don't exactly remember.

Page 1691: Q. You don't remember whether it is \$1,000 or \$500?

A. No, I don't.

Q. Now, why is it that you can't remember that which it was? Are you in the habit of having as much as five hundred and a thousand dollars on you from time to time?

A. No, I am not.

Q. Did you ever have as much as \$500 at any one time before?

A. No, I haven't.

* * * * *

Q. You don't remember ever having a \$1,000 dollars at one time?

A. I don't remember whether it was a thousand or \$500.

Page 1692:

Q. —what I am trying to get at is, Bobby, how come you can forget whether it was five hundred or a thousand, if you never had that much money before?

A. I don't know; it was either five hundred or a thousand dollars; I don't remember exactly which one.

July 25, 1958

Page 2650:

A. —I got up and stepped through the back door, and somebody turned me around and put a gun, I guess in my neck and asked me not to move, somebody searched me, and I was put in a car and taken somewhere and given some money and told to leave town.

Page 2604:

Q. Now, did they walk alongside of you as you walked out the driveway?

A. Yes, one had me by the arm.

Q. Which arm?

A. The left I think.

* * * * *

Q. And the other one was on the other side of you or what?

A. I don't remember exactly how many took us to the car.

* * * * *

Q. You don't know whether this was one or two?

A. No, I don't.

* * * * *

Page 2611: Q. Who do you mean by the one on the inside?

A. Well, there was someone on the inside of the car, who, I don't know.

Q. One on the back seat?

A. Yes.

Page 2612: Q. All right, when you got in the car, where did you sit?

A. I was sitting in the middle.

* * * * *

Q. All right, after you got in, the man that was with you did what, did he go back to the house?

A. No, he didn't.

Q. He got in the car with you?

Page 2613: A. Yes.

Q. And then what happened?

A. A few minutes later I heard two shots and someone hurrying away, got in the car and drove off.

* * * * *

Page 2615: Q. Where did he get in?

A. Got in the front seat.

Q. Next to the driver?

A. He got in the front seat, evidently he must have been the driver.

Page 2628:

Q. But they knew you had two children?

A. Evidently; they mentioned it.

Q. Which one mentioned it?

A. The one on my left.

LENGTH OF TIME APPELLANT
HAD KNOWN THOMAS

April 16, 1958

Page 195:

Q. How long have you known—did you know Cecil Thomas?

A. Over a period of about three or four months.

Page 222:

Q. There is no question in your mind but that that is Hardrock, is there?

A. No there isn't.

Q. You knew him well?

A. Well, I told you I only knew him about four or five months.

May 23, 1958

Page 1243:

Q. Now, how long had you known Cecil Thomas before the day of the murder?

A. Well, I would say about three or four years at most.

July 25, 1958

Page 2551:

Q. * * * Now, will you tell the Grand Jury how long before October 28, 1957, you met Cecil Thomas, approximately?

A. I don't exactly remember.

Q. Give us your best recollection?

A. I couldn't do that because I don't remember

* * * * *

Page 2552: A. I had been knowing him approximately four years.

HOW APPELLANT CAME TO KNOW THOMAS

April 16, 1958

Page 196: Q. Did you meet him (Hardrock) by arrangement here?

A. No, I met him through a friend . . .

* * * * *

A. Well, they call him Big Jay. That's all I know him by.

July 14, 1958

Page 1697: Q. Who was it introduced you to Hardrock?

A. I don't remember, Mr. Goldschein.

Q. Do you remember telling the Grand Jury if it was Big J?

A. I don't remember making that statement; I could have made it; I don't know.

Q. What?

A. I don't know. I could have made it.

Q. Well, if you made it, was it true, or was it one of those yarns you were telling the Grand Jury?

A. I got introduced to him—by who I don't remember.

Q. If you told the Grand Jury it was Big J?

A. It was Big J.

Q. —Were you telling the truth then?

A. Yes.

NUMBER OF TIMES APPELLANT WAS IN
THOMAS' HOUSE

April 16, 1958

- Page 201: Q. How many times were you in Cecil Thomas' home?
A. Once.
Q. When was that once?
A. That's when I shot him.

July 25, 1958

- Page 2552: Q. Did you ever go to his house before?
A. I think once before I am not sure.
Q. You say once, or twice?
A. Once before, yes.

* * * * *

- Q. Was it the same place?
A. Yes, it was the same place.
Page 2555: Q. That was the same place where you were on October 28, 1957?
A. Yes, it was.

APPELLANT'S USE OF NARCOTICS

April 16, 1958

- Page 223: Q. Did you use heroin?
A. Yes.
Page 224: Q. How big a habit did you have?
A. Oh, I would say about two spoons a day.
Page 225: Q. One or two. What do two spoons a day cost you?
A. Well \$40 to \$50.
Q. Forty or \$50 a day?
A. Yes.

- Page 231: Q. What did you do with the thousand dollars? (That he got from the men).
* * * * *
- A. I mostly bought narcotics and a few clothes.

July 14, 1958

- Page 1698: Q. How big a habit did you have?
A. Well a spoon would last me a month.

July 25, 1958

- Page 2641: Q. And that you were addicted to heroin?
A. No, I made no statement like that.
* * * * *

- Page 2642: Q. You didn't make a statement that you had a habit of 20, \$40 a day?
A. No, I think you made that statement, didn't you?
Q. I made the statement?
A. Yes.
Q. Where did I get that—
A. You said I told you that, but I said I would get a spoon of heroin that would cost me \$25.00; that would last me quite sometime.

APPELLANT'S KNOWLEDGE OF QUANTITIES OF HEROIN

April 16, 1958

- Page 204: Q. What do you mean by a half a piece of stuff?
A. A half a piece of heroin.
Q. That's how much?
A. A half of a piece.
Q. What is a piece?
A. A piece is a large quantity.

- Q. An ounce?
A. It is, more or less, yes.
- Page 225: Q. Half a piece. That is about half an ounce?
A. Yes, something like that.
Q. How many spoons in an ounce?
A. The exact amount of spoons in an ounce, that is hard to tell. It all depends on how much they cut it and you know—.
- Page 226: Q. How much did you pay for a spoon?
A. A spoon? \$20.00.

July 14, 1958

- Page 1694: Q. How much is a half a piece of stuff Bobby?
A. I don't know. I never measured it.
Q. I don't care whether you measured it, give us an idea of what it is.
A. I couldn't do that, I am not that familiar with narcotics.
- Page 1695: Q. How much did you buy from Alexander at one time?
A. Oh, I have gotten—six or seven spoons from him.

* * * * *

- Page 1696: Q. Six or seven spoons, how many spoons in a half a piece about.
A. I couldn't tell you off hand, Mr. Goldschein.

* * * * *

APPELLANT'S PURCHASES OF HEROIN

April 16, 1958

- Page 223: Q. Did you ever get any narcotics from Big J?
A. No.
- Page 231: Q. What did you do with the thousand dollars?
A. I spent it.
Q. Do you remember what you did with it?
A. I mostly bought narcotics and a few clothes.

May 23, 1958

- Page 1239: Q. Who did you buy heroin from Bobby?
A. Well there were several people
* * * * *
- Page 1240: There was Walter Alexander—there was his woman, I imagine Shirley. There was also Big Jay.
- Page 1242: Q. Now who else did you buy heroin from?
A. Well there was Big J, Walter and I also got heroin from Marie.
- Page 1245: Q. Did you ever buy any heroin from Don Newton?
A. Yes, I have.
- Page 1246: Q. How many times did you buy heroin from Don Newton?
A. Well, several times.
* * * * *
- Q. About when was the last time?
A. I said it was quite some time ago.

Q. How long before the killing, Bobby, of Hardrock?

A. I would say about 60—from 30 to 60 days, somewhere about there.

July 14, 1958

Page 1678:

Q. How much heroin did you buy from Don Newton?

A. I don't recall.

Page 1683:

Q. How long has Newton been a go-between, as you call it, for you?

A. Oh, I got narcotics from him twice.

* * * * *

Q. When was the last time you got heroin from him?

A. I don't remember, it has been quite some time Mr. Goldschein.

Page 1686:

Q. Now, will you tell us how much heroin you got from Don Newton?

A. I don't remember.

Page 1693:

Q. Did you ever buy any heroin from Hardrock?

A. I don't remember.

July 25, 1958

Page 2643:

Q. We are satisfied that you could have; Shirley O'Dell was Walter Alexander's girl friend, wasn't she?

A. Yes, she was.

Q. Now, my question is, did you ever buy any from her?

A. Yes, I did.

APPELLANT'S DESCRIPTION OF CAR

April 16, 1958

Page 239:

Q. Now, when this man that had the gun to the back of your head, took you out to the car in front of Cecil Thomas' house on the night of the killing, what kind of a car was it?

A. It was a Ford.

Q. A new Ford?

A. Well, it wasn't new. It was about a '56 or '57, something like that.

July 25, 1958

Page 2609:

Q. Now when you got to that car what kind of a car did you see there?

A. I don't know exactly what kind of a car it was.

Q. Was it a big car?

Page 2610:

A. I don't remember if it was a large car or not; it was a car.

Q. Well, you know whether it was a large car or a small that you got into?

A. It was a medium car, just a car, that is all I know.

Q. Was it a four door car?

A. Yes, it was.

APPENDIX B

Exhibits

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1	24	24
2	42	51
3	42	52
4	52	169
5	52	169
6	52	169
7	52	169
8	108	109
9	111	121 (withdrawn)
10	111	121 (withdrawn)
11	134	

